86-610

Supreme Court, U.S.
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No. _____

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1986

BEVERLY L. BREAUX,
ATTORNEY FOR NORA EICHORN BOSWELL,
Appellant
v.
ALLIED BANK OF TEXAS
SECOND TEMPORARY GUARDIAN OF
ESTATE OF NORA EICHORN (BOSWELL),
Appellee

ON APPEAL FROM
THE SUPREME COURT OF TEXAS

JURISDICTIONAL STATEMENT

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for Appellant

Due: October 14, 1986

QUESTION PRESENTED

Whether Texas Probate Code,

- §131 (Temporary Guardianship) as then enacted,
- §419 (New Trial), and
- Probate Court practice of appointing the same person (Michael J. Cenatiempo) as both Attorney ad litem and Temporary Guardian of Person,

violate the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution, having <u>together</u> been used:

-- to deny an elderly citizen (Nora Eichorn, age 84, who died as Nora Eichorn Boswell at age 86) of fundamental rights, such as free mobility and self-determination of where, and with whom, she would spend her final days, and

-- to deny compensation to her chosen, hired Attorney (Appellant Beverly L. Breaux) for requested services, rendered in defending such violated rights, after a jury verdict of "<u>not</u> mentally incompetent"?

PARTIES AND PARTICIPANTS

The Appendix (App. A1) lists, in order of appearance, the 16 involved in the contested guardianship action, and in this derivative suit to collect attorney fees--including 9 law firms, 2 Courts and The State Bar of Texas.

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In the
SUPREME COURT OF THE UNITED STATES
October Term, 1986

BEVERLY L. BREAUX,
ATTORNEY FOR NORA EICHORN BOSWELL,
Appellant

v.

ALLIED BANK OF TEXAS,
SECOND TEMPORARY GUARDIAN OF
ESTATE OF NORA EICHORN (BOSWELL),
Appellee

ON APPEAL FROM THE SUPREME COURT OF TEXAS

JURIDICTIONAL STATEMENT

Appellant, Attorney Beverly L. Breaux, appeals from the final judgment of the Supreme Court of Texas, July 16, 1986 overruling Appellant's Motion for Rehearing on Application for Writ of Error, which said Court refused March 5, 1986 with notation of its opinion of "No

Reversable Error" contained in the Substituted Opinion dated September 26, 1985 (replacing withdrawn Opinion dated July 18, 1985), rendered by the 14th Court of Appeals at Houston, Texas, affirming Summary Judgment, rendered for Appellee, Allied Bank, by Probate Court No. 3 of Harris County, Texas on August 29, 1984, in this derivative suit to collect Attorney fees, following a contested Guardianship action in said Probate Court. This Court has jurisdiction, and this case presents a Substantial Question, with far-reaching consequences, which go beyond the parties involved: This case has already been used as precedent, by the State Bar of Texas, in a disbarment suit in another county. In other such cases, however, this substantial question is likely to evade review by this Court, because elderly Wards will usually:

1) die before their federal constitutional claims can be brought to this Court, and

2) be represented by Court-appointed Attorneys who, failing to serve as true advocates, are unlikely to pursue such appeals.

OPINIONS BELOW

1. Judgment of the Supreme Court of Texas, of March 5, 1986 (App. A4) refusing Application for Writ of Error, with Opinion of "No Reversible Error", is reported in West's Cumulative Writs of Error and Rehearing Table, July 1, 1986.

2. Substituted Opinion of the 14th Court of Appeals of September 26, 1985 (App. A9) is reported at 699 S.W.2d 599

   --with errors in naming the Probate Court Judge and the Attorneys for Appellant and for Appellee.

   The Appendix (* at A27) contains the 3 sentences deleted from the Withdrawn Opinion of July 18 1985 (after Motion for Rehearing and State Bar Motion for Publication).

3. Order of Probate Court No. 3 of Harris County Texas of August 29, 1984, (App. A33) Granting Summary Judgment based

upon disputed facts, declared to be undisputed facts, is not reported.

4. Order of Probate Court No. 3 of Harris County, Texas of October 19, 1984 (App. A36),

   -Granting Motion to Compel Production by Court Reporter of transcript for November 24, 1981 (the mistrial), and

   -Denying Motion to set aside Summary Judgment for Defendant Bank and Enter Summary Judgment for Plaintiff Attorney (i.e. Motion for New Trial) is not reported.

JURISDICTION INVOKED

Appeal is taken from the judgment of the Supreme Court of Texas, refusing Application for Writ of Error, with opinion "No Reversible Error", which was entered March 5, 1986 (App, A4). Motion for Rehearing was overruled July 16, 1986 (App. A5).

Notice of Appeal (App. A6) was filed July 29, 1986 in the Supreme Court of Texas; copy was filed July 28, 1986 in

the 14th Court of Appeals, as the Court possessed of the record. (Separate Notice of Appeal was filed July 29, 1986 in the 14th Court of Appeals, as an attachment to Motion for Stay of Mandate.)

This appeal is being docketed in this Court within 90 days from said denial of rehearing. Jurisdiction of this Court is invoked under 28 U.S.C. §1257 (2). Though the Texas Courts did not specifically rule on the validity of the challenged statutes and Court practice, their failure to do so does not thereby avoid review by this Court. Where the "necessary effect of the judgment had been to deny the federal claim, that is enough." New York ex. rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928).

CONSTITUTIONAL PROVISION, STATUTES AND COURT PRACTICE INVOLVED

More fully presented in Apppendix (A38):

Directly involved:

14th Amendment, U.S.Constitution.

Texas Probate Code:

§131 Procedure for Temporary Guardianship, effective Jan 1, 1956.

§419 New Trial.

Probate Court practice of appointing the same person (Michael J. Cenatiempo) Attorney ad litem and also Temporary Guardian of Person.

Also involved:

§130A thru O Limited Guardianship, effective Sept 1, 1983 (about 3 months after death of Nora Eichorn Boswell).

H.B.No. 2034, effective May 26, 1985 (about 2 years after death of Nora Eichorn Boswell)

Sec. 1 amended §131, adding Due Process protections;

Sec. 2 added §118A, Designation of Guardian Before Need Arises.

STATEMENT OF THE CASE

A. HOW THE FEDERAL QUESTION WAS RAISED

In Probate Court

In the contested guardianship matter, the original jury verdict was that Temporary Ward Nora Eichorn was not mentally incompetent. Attorney ad litem and Temporary Guardian of Person, Michael J. Cenatiempo, proposed and drafted a "Final Judgment" (R. 237) declaring his Client-Temporary Ward mentally incompetent, notwithstanding verdict that she was not mentally incompetent. Appellant Attorney Beverly L. Breaux refused to sign that proposed Judgment and set for hearing November 20, 1981 (R. 016, entry 11-16-81):

> -Opposition to Judgment NOV,
> -Motion for Judgment on Verdict and
> -Motion to Remove/Disqualify Cenatiempo as Attorney/Guardian

--asserting the inherent conflict in the Attorney and Guardian roles, asserting

Nora Eichorn's constitutional right to representation by a true advocate when loss of liberty and rights are at risk, and citing federal decisions on this Due Process issue, such as Lessard v. Schmidt, 349 F.Supp. 1078, 1097-99 (E.D. Wis. 1972) vacated on other grounds per curiam, 414 U.S. 473, 94 S.Ct. 713, 38 L.Ed. 2d 661 (1974) (re civil commitments); and citing a state decision that the obligations of an Attorney appointed by the Court are no different from those of a privately retained lawyer. State ex rel. Memel v. Mundy, 75 Wis.2d 276, 249 N.W.2d 573, 577 (1977). The Motions were denied and a New Trial was ordered to begin 4 days later, November 24, 1981. (The judge announced he would decide the case; Appellant paid the jury fee.)

At the New Trial, November 24, 1981, Appellant again asserted Nora Eichorn's

right to an advocate and also raised federal constitutional objection to Texas Probate Code §419 (New Trial)(R. 271-272):

> Ms. Breaux: Your Honor, I want it on the record that I object to this new trial. There is at risk the liberty of Nora Eichorn, and what we have here is double jeopardy after a jury verdict that set her free. The statute that allows a new trial--violates the equal protection of the United States Constitution.

After the death of Nora Eichorn Boswell, in this derivative suit for Attorney fees, the Probate Court entered Summary Judgment for Appellee Allied Bank. In what served as Appellant's Motion for New Trial (R. 196), Appellant's right to compensation and to Summary Judgment was asserted, based upon Nora Ecihorn's several constitutional rights (R. 206):

> ***including her due process right to an attorney of her choice, who would serve as her true advocate,in accordance with her wishes for herself.
>
> ****Section 419, TEXAS PROBATE CODE, under which the Court***granted a

> New Trial, is believed to be unconstitutional, as a violation of the "equal protection" clause of the 14th Amendment, because Texas law does not permit a new trial after a jury verdict favorable to an accused criminal, nor to a proposed mental patient.

In 14th Court of Appeals:

On appeal of the adverse Summary Judgment to the 14th Court of Appeals, it was asserted (Point of Error 1) that:

> Nora Eichorn Boswell was not a Permanent Ward without rights but a Temporary Ward, who fully retained presumption of competence, all contract rights and all constitutional rights, including the right to an Attorney of her choice to defend those rights.

The affirming opinion of the 14th Court of Appeals was a surprise, which could not have been reasonably anticipated from prior decisions. At page 3 (App. A14) it states: "We agree that there was no final adjudication of incompetence." (emphasis added) Yet, because a Temporary Guardian had been appointed, at pages

4-5 (App. A17) it applies to the case Restatement (Second) of Contracts §13 (1981):

> A person has no capacity to incur contractual duties if his property is under guardianship by reason of an adjudication of mental illness or defect.(emphasis added)

Thus the opinion conflicts with prior Texas decisions:

In re guardianship of Dahl, 590 S.W.2d 191 (Tex.Civ.App.--Amarillo, 1979, writ ref'd n.r.e.) according to which Temporary Guardianship documents "in no manner represented a prior adjudication of incompetency" (at page 195), even though each document labeled Mr. Dahl an "incompetent"; and

Houston Bank & Trust Co. v. Lee, 345 S.W. 2d 320 (Tex.Civ.App.--Houston 1961, writ dism'd) wherein, following a stroke, Temporary Guardians were appointed by an Order reciting that Mr. Lee was not

mentally competent to conduct his own business and personal affairs. Nevertheless, the order:

> ***was not a final judgment, and did not "judicially declare" Gabriel J. Lee, Sr. incompetent****By the terms of Section 131***other proceedings were contemplated and necesary before the judgment became final." (at page 324) (emphasis added)

Because Section 131(b) allows appointment of Temporary Guardians by ex-parte proceedings "with or without written application and without notice or citation", this conflicting opinion of the 14th Court of Appeals was a surprise and presented the first opportunity to challenge the constitutional validity of this statute, for lack of Due Process. Of further surprise, was the opinion at page 7 (App. A23): "Appellant has failed to show any of the alleged legal services rendered were "necessaries."

Original appeal had focused upon

Appellant's right, by contract or quasi-contract, to compensation for services which were clearly necessaries, and upon disputed facts which barred Summary Judgment for Appellee Allied Bank. Now, in Motion for Rehearing by the 14th Court of Appeals, Due Process and Equal Protection challenges were made to the constitutional validity of §131 (Temporary Guardianship) in Assignments of Error 12 & 13; to §419 (New Trial) in Assignments 17 & 18; and to the Probate Court practice of appointing the same person (Michael J. Cenatiempo) as both Attorney ad litem and Temporary Guardian of Person, in Assignment 19.

Motion for Rehearing was overruled without opinion, though 3 sentences (* at App. A27) were deleted from the Original Opinion of July 18, 1985, and the appellate Court granted State Bar

of Texas Motion for Publication (App. A30) for use in a disciplinary action in another county.

A federal claim first raised by Petition for Rehearing in a state Court is in time, for purposes of federal review, if it was raised at the first opportunity, even-though the Petition was denied without opinion. Brinkerholff-Farris Trust Co. v. Hill, 281 U.S. 673, 677-78 (1930).

In Supreme Court of Texas:

Upon Application to the Supreme Court of Texas for Writ of Error, focus was again upon contract or quasi-contract for "necessaries," and Due Process and Equal Protection challenges were again made to the constitutional validity of:

-§131--in Point of Error 3,
-dual appointment--in Point 8, and
-§419--in Point 9.

The Supreme Court of Texas refused

the Application for Writ of Error with notation expressing its opinion: "No Reversible Error." The Motion for Rehearing in the Supreme Court of Texas presented a single Point of Error 1:

> The lower Courts erred in granting and affirming the Summary Judgment because:
>
> a. Probate Code §131, pertaining to Temporary Guardianship,
> b. Probate Court practice of appointing the same person as Attorney ad Litem and Guardian of Person (Michael Cenatiempo), and
> c. Probate Code §419, pertaining to New Trial,
>
> all violate the 14th Amendment of the U.S. Constitution and together deprive elderly, incapacitated Texans, with property, of liberty without Due Process and Equal Protection under Texas laws; and upon violation of her fundamental constitutional rights, Temporary Ward Nora Eichorn Boswell had the further right to request and receive services of a true advocate of her choice, for which services Petitioner Attorney Beverly L. Breaux is entitled to compensation by contract or by quasi-contract.

The Supreme Court of Texas overruled the Motion for Rehearing.

The Texas Courts have thus considered and rejected these federal constitutional claims.

B. STATEMENT OF FACTS

In May of 1981, Nora Eichorn (age 84, active Avon Lady) asked her banker to recomend an Attorney. Appellant Beverly L. Breaux was recomended. At the further request of Ms. Eichorn, the banker phoned to arrange a meeting at the bank. On May 19, 1981, at the Bank of Houston, Appellant Attorney Beverly L. Breaux met, and was hired by, Nora Eichorn. Their agreement was for fees at Ms. Breaux's usual hourly rate (R.127). Ms. Eichorn was accompanied by Mr. James L. Boswell (age 86), whom she introduced to Beverly Breaux as her close friend of about 8 years and daily companion.

Stroke. Missouri Relatives.

In June-July 1981, Ms. Eichorn was hospi-

talized for 3 weeks, with a stroke-like condition (which left her with impaired language skills). Missouri relatives (Nephew Robert Crow; his wife, Betty; and his mother, Odessa, the sister of Nora Eichorn) arrived and, though Ms. Eichorn spoke incoherently and appeared to be dying, announced an intention to remove her to a Missouri institution, about 17 miles from their home. Their relationship with Ms. Eichorn was not close. They admitted that, by her choice, there had been about 30 years when she had no contact with any relative, when they did not even know her whereabouts, and that she had continually refused recent invitations to move to or visit Missouri. (R.128) Removal to Missouri would have been against Ms. Eichorn's expressed and known wishes, but Ms. Breaux, speaking as the attorney of Nora Eichorn, was unable

to dissuade Nephew Robert Crow.

Temporary Guardianship.

To protect Ms. Eichorn's life, while in a critical condition, and to prevent her removal from Houston, Texas against her wishes at a time when she could not speak for herself, her Attorney Beverly Breaux, on June 26, 1981, filed application for, and obtained, appointment of Mr. James L. Boswell (Ms. Eichorn's close friend) as Temporary Guardian of Person and Estate. At all times, Beverly Breaux acted as Attorney solely for Nora Eichorn, and any apparent services to Mr. Boswell, were rendered to him solely in his capacity as agent of Nora Eichorn, acting in accordance with Ms. Eichorn's known wishes for herself. (R. 128)

On the next business day, Monday June 29, 1981, Nephew Crow's Application for guardianship was filed by Attorney Percy

Foreman in Probate Court No. 2. It was later refiled by another law firm in Probate Court No. 3, as a contest to the Boswell appointment, and Nephew Crow claimed a statutory right to the appointment as Guardian.

Probate Court Appointments.

On August 24, 1981, The Probate Judge appointed Michael J. Cenatiempo as Attorney ad litem for Nora Eichorn and (more than once) proposed "third party" Guardian appointees during the contest. (The Cenatiempo appointment was a discretionary appointment, under Texas Probae Code §113A (App. A40).) Trial began on that date. On August 28, 1981, trial was continued, in acordance with an "Agreed Order" (R. 221), negotiated by Mr. Cenatiempo, appointing Michael J. Cenatiempo and Allied Bank as Temporary Guardians, during a 60 day continuance, expiring October 27,

1981 (R. 223). (The Judge's selection of Allied Bank was, thereby, also selection of its attorneys, Butler & Binion, who now office in Allied Bank Plaza.)

In accordance with the specific terms of that written Agreed Order, those appointments expired, and trial resumed on October 27, 1981.

Recovery. First Jury Verdict.

Nora Eichorn made a rapid physical recovery, but was left with impaired language skills (aphasia (R. 217, 4.), as is characteristic of stroke victims). After transfer to a nursinghome, she, in the company of Mr. Boswell, resumed their usual social activities: attending church, Avon meetings, visiting friends. After mid-July 1981, Ms. Eichorn was expresing preferences and making clear requests and demands. She declared to Beverly Breaux and others that she did

not want to be taken to Missouri by her nephew, that she would "run away" if taken, and would "kill" herself if taken (R. 129, lines 1-4). She made her wishes known to Nephew Crow. Litigation should have then ended; yet he persisted.

No Application, and no Order appointing First or Second Temporary Guardians had ever stated or decreed Nora Eichorn to be mentally incompetent. Trial resumed on October 27, 1981. Though no jury had been requested and no jury fee had been paid, the Judge called for a jury. The jury verdict, October 28, 1981, was that Ms. Eichorn was "not mentally incompetent." (Disputed fact: Contrary to the statement contained in the written Order (R. 224) signed January 5, 1982, there was no hearing on October 27, 1981 of Allied Bank's Application for extension of its appointment (R. 209, first item).

Violation of Constitutional Rights in Probate Court.

This jury verdict should have ended all litigation--and the accruing of all attorney and guardian-bank fees. Instead, Attorney ad litem Cenatiempo proposed and drafted a Final Judgment (R.237), declaring Ms. Eichorn mentally incompetent, notwithstanding verdict that she was not mentally incompetent. After consulting with Nora Eichorn on October 30, 1981 (R. 129), Beverly Breaux drafted the durable General Power of Attorney signed by Nora Eichorn on November 9, 1981 delegating medical and financial decision-making to Mr. Boswell, and alternately to her minister, Reverend Donald Goodwin of Riverside United Methodist Church. Paragraph 6 stated the intent to avoid necessity for Guardianship, but in the event a Guardian

was appointed, instructed the Court to appoint only Mr. Boswell or Reverend Goodwin. (Affidavit of friend Marjorie Benge tells of her prior discussion of the Power of Attorney with Ms. Eichorn, and of its signing at Bank of Houston on November 9, 1981. (R. 192, 6))

Beverly Breaux then refused to sign the Judgment n.o.v. proposed by Attorney ad litem Cenatiempo, and filed Motions in the Probate Court (p.7, supra), opposing his Judgment n.o.v., seeking his removal, and seeking Judgment on the Verdict. At the hearing of Motions on November 20, 1981, a New Trial was ordered, to begin 4 days later, on November 24th. Thus, what began as a battle against Missouri relatives, became a battle also against unconstitutional guardianship statutes and Probate Court practice.

New Trial, Nov. 24, 1984 (Mistrial).

At the hearing of November 20, 1981 the Probate Court denied Appellant's Motion to remove Mr.Cenatiempo from his dual, conflicting roles as Attorney ad litem and Guardian of Person. At the new trial of November 24, 1981 Appellant repeated assertion of Nora Eichorn's Due Process right to a true advocate and objected to the New Trial as a violation of the Equal Protection clause of the 14th Amendment (p.9, supra). In response to the Court's questioning, both Beverly Breaux and Mr. James Boswell confirmed that Nora Eichorn was the client of Beverly Breaux. Attorney ad litem and Guardian of Person Cenatiempo moved "Ms. Breaux be disqualified as attorney of record in this case" (R. 279). The Court did not grant this Motion. Instead, the Court "disqualified" Ms. Breaux "from acting on behalf of Mr. James Boswell" (R. 280).

The trial went forward with Beverly Breaux continuing as Attorney for Nora Eichorn and arguing for competency of Nora Eichorn (R. 281-282).

Note: It required 10 months (R. 203) and Court Order (R. 269) to obtain the transcript of Nov. 24, 1981 from the Court Reporter. It was not available prior to Summary Judgment in this derivative suit for fees, but is included in Record for appeal (R.270-290). By Bill of Exception, objections were made to deletions (Supp.R. 4-11).

Comment:

The Probate Court thus demonstrated its power to "disqualify" an attorney from representing a person in that Court. The Probate Court could have "disqualified" Beverly Breaux from representing Nora Eichorn; it did not do so. It is to the credit of the Probate Judge that he acknowledged Beverly Breaux as the independently retained counsel of Nora Eichorn, and allowed Ms. Eichorn to be represented by her chosen attorney--and did so, over the objection of Attorney ad litem and Temporary Guardian Cenatiempo. However, this measure of Due Process is inconsistent with the Court's failure to compensate the services rendered, and inconsistent with the Summary Judgment ruling that Temporary Guardians disaffirmed

> the Eichorn-Breaux contract on June 25, 1982, the date the Court "abated" the hearing on Appellant's application for payment for these same services which the Court (and thereby its supervised Guardian-appointees) accepted for their Temporary Ward on November 24, 1981.

This trial ended as a mistrial. The Probate Court instructed Mr. Boswell to obtain counsel for himself, and in later proceedings, he was represented by Attorney James J. Hippard, Sr., a University of Houston professor of law (R. 129).

24-Hour Guards. 2nd Verdict.

The next trial began February 2, 1982; the second jury verdict, February 5, 1982, was that Ms. Eichorn was "mentally incompetent." Appellant believes this unfavorable jury verdict to have been produced by 24-hour nurse-guards, posted upon Ms. Eichorn, by Mr. Cenatiempo, for the 7 days immediately prior to trial (R. 130). This guarding, at $325.00 per

day, cost the Estate $2,280.00 (R. 25, entry 02-07-82) and placed a guard within 2 or 3 feet of Ms. Eichorn, sitting at her table, sitting or standing in her bedroom, able to overhear every word, watching every movement. (R. 130) Such guarding severely deprived her of privacy and caused Ms. Eichorn to appear to be emotionally unstable in the courtroom. The extremely emotional outbursts, which marked the February 1982 trial, were absent from the November 24, 1981 mistrial.

Selection of Guardian. Marriage.

Apellant had attempted to hault litigation by proposing other Houston guardians: Allied Bank as Guardian of Estate, minister, Reverend Donald Goodwin, or friend, Mrs. Dorris Vater, as Guardian of Person. Such settlement offers were all rejected.

There was no complete trial on the issue

of who would be Guardian. At the continuation of trial on February 12,1982, one applicant for appointment (friend, Mrs. Dorris Vater) testified, and the Judge terminated the trial. Appellant had no opportunity to present evidence that appointment of statutory "nearest of kin" would not be in the best interest of Nora Eichorn, and was contrary to her expressed wishes for herself. (R. 214, #6)

Appellant sought, by letter request to Mr. Cenatiempo, and by Motion to the Court filed March 12, 1982 (R. 214, #7), opportunity for Nora Ecihorn to verbally express her preferences to the Court, with respect to selection of a Guardian. Nora Eichorn was never given that opportunity. By telephone, on Friday, March 19, 1982, (before the Motion was set for hearing), Appellant was notified

by the Court that the Judge intended to appoint Nephew Crow as Permanent Guardian. Ms. Eichorn's only recourse under §109(c) Texas Probate Code (App. A41), was to marry. On March 22, 1982, she married James L. Boswell, her friend of about 8 years and daily companion. (R. 214 #8) Her marriage was an exercise of a fundamental, federally protected, right; and was in accord with competency standards for a valid marriage under §2.45 Texas Family Code. (See Affidavit of Reverend Donald Goodwin, R. 125, regarding Ms. Eichorn's (a) understanding of the ceremony and (b) her consent.)

At the March 26, 1982 hearing of Nephew Crow's Motion for Judgment on the new verdict and for his appointment, Mr. Boswell's Attorney, James Hippard, announced that Nora and James Boswell had been married at the nursinghome, by their

minister, on March 22, 1982; that they had signed a property agreement on March 23, 1982 in which each disclaimed all right to the property and income of the other (an agreement drafted by Appellant); and that a spouse had statutory preference, under §109(2) Texas Probate Code, in the appointment of a Guardian. Judge Scanlan ordered suit filed in the Family Court "to dissolve" the marriage. (R. 130)

Family Court Suit.

As special appointed counsel, the law firm of Smith & Conner filed suit on behalf of purported Second Temporary Guardians in Family Court. Neither Guardians nor special counsel consulted Ms. Eichorn-Boswell as to her wishes in the matter (R. 131). Appellant sought dismissal of the suit on grounds that:

1. Nora Eichorn had never been decreed mentally incompetent, and

2. Written order for 60 day appointments of Temporary Guardians had expired, and though Allied Bank had been again appointed by written order signed Jan 5, 1982 (R.224), Mr. Cenatiempo's appointment had not been renewed.

Attorney ad litem's Motion for Interlocutory Order.

In the Probate Court, Mr. Cenatiempo apparently obtained signature on October 26, 1982 on the "Order" (R.288) he had drafted, based upon the hearing of June 25, 1982, which order "ratified and extended" his appointment as Temporary Guardian of Person (though that was not a matter addressed in open Court on that date (R. 209, second item)).

In the Probate Court, Mr. Cenatiempo filed Motion for, and on November 29, 1982 obtained, "Interlocutory Judgment" (R. 245), which, for the first time, decreed his Client and Temporary Ward "mentally incompetent."

Based upon the conflict, stated by Beverly Breaux to exist between the Temporary Guardians and their Ward, the Family Court made still another Atorney ad litem appointment: Mr. Brent Berg of Joe Rentz & Associates.

Nursinghome Imprisonment.

By mid-May 1982, Nora Eichorn Boswell had made a rapid recovery from a fall and hip surgery, yet she was unreasonably confined (actually imprisoned) in her nursinghome by Mr. Cenatiempo. She expressed anger and frustrtion over her imprisonment (See Afidavit of Nurse Practioner Shirley Bradley, of Bishop's Office of Aging Ministry, R. 217-218), and requested the help of Appellant Beverly Breaux (R. 131, 2nd paragraph).

Appellant Breaux and Attorney Hippard filed a joint Motion seeking relief in the Family Court--which deferred to the

Probate Court--which set, reset, and indefinitely deferred the matter. Appellant returned to the Family Court--which again deferred to the Probate Court--which finally set the matter for hearing; relief was finally obtained on November 5, 1982. Thereafter, Ms. Eichorn-Boswell was allowed to leave the nuringhome--in the company of a Nurse-Driver sent by Mr. Cenatiempo, after Appellant gave him advance notice of planned destinations, with addresses, phone numbers, times of departure and return (R. 131). (Thus the Guardians both created the necessity for these services of Appelant, and then, under Probate Court supervision, accepted them on behalf of Nora Eichorn Boswell.)

Nora Eichorn Boswell died May 17, 1983, a few days before the trial of the marriage was set to begin in Family Court.

Hearing Abated June 25, 1982 on Application for Fees.

Each of Appellant's fee statements (paid and unpaid) was addressed to Nora Eichorn (Boswell). None were ever addressed to Mr. Boswell, because he was never the client of Beverly Breaux. This may be verified by examination of three paid fee statements placed into the Record by Allied Bank. Each is addressed to Mrs. Nora Adams Eichorn, and they are dated Sep 30, 1981 (R.89), Oct 17, 1981 (R.93), Oct 31, 1981 (R.96). Fee statements, addressed to Mrs. Eichorn, for services rendered prior to November 1, 1981 were paid by 1st Temp. Guardian Boswell ($12,102.90) or by 2nd Temporary Guardian Allied Bank ($19,150.60). Four fee statements remain unpaid, for services rendered, as requested by Nora Eichorn, after written appointments of Second

Temporary Guardians expired on October 27, 1981, and after the original jury verdict October 28, 1981 of "not mentally incompetent." It was after these dates that violation of Ms. Eichorn's federal rights occurred. Appellant's protests then began; Appellant's compensation then stopped.

Application was made to the Probate Court for payment of the first unpaid fee statement, while Ms. Eichorn-Boswell was still living. At the hearing of June 25, 1982 the Court "abated" the matter until after final judgment in the Family Court (R. 226 = Order,unsigned; R. 228 = Order, signed October 26, 1982).

Appellee Allied Bank claims, and the 14th Court of Appeals agrees, that Guardians' opposition to this Application for fees served as their disaffirmance of the Breaux-Eichorn contract. If so,

Appellant would be entitled to partial Summary Judgment for 3 of the 4 fee statements, for about 8 months of services to that date, Nov 1, 1981 to Jun 25, 1982, during which Guardians took no such action to disaffirm. However, as acknowledged by the 14th Court of Appeals, contracts for necessaries cannot be disaffirmed by Guardians; therefore Appellant is entitled to payment of all 4 fee statements.

Suit on Rejected Claims.

After the death of Ms. Eichorn-Boswell, additional Applications for payment were filed in the Probate Court. By letter (R. 142) all attorneys, including Appellant, were informed by Butler & Binion (attorneys for Allied Bank), of the Probate Court's instruction to file formal Claims with Allied Bank--though previously payments had been obtained by Application

directly to the Court. Allied Bank approved Claims of all other attorneys, but denied the Claims of Apellant Breaux.

Note: Fees of $128,393.91 (R. 213) have been paid through the Probate Court to recipients other than Appellant, from liquid funds which, prior to any guardianship totaled $353,746.24. Fees for Allied Bank and its attorneys continue to accrue, and to be paid from this estate.

Appellant sued on the rejected claims, which totaled $94,657.58 (for 877-1/4 hours and $660.08 expenses) for the 19 month period, Nov 1, 1981 through May 31, 1983, as itemized in 4 statements composed of 43 (8-1/2" x 14") pages. Appellee Allied Bank filed Motion for Summary Judgment. Appellant filed Opposition to Allied Bank's Motion, disputing its facts, and Cross-Motion for Summary Judgment (R. 112). Allied Bank filed no answer to this Cross-Motion, leaving Appellant's evidence undisputed.

The Probate Court granted Summary Judgment for Allied Bank, based upon disputed facts (regarding 2-month and 1-year gaps in written appointments ' of Temporary Guardians, and their acceptance, under Court supervision, of Appellant's services), which facts were simply declared to be undisputed.

Will of James L. Boswell.

Appellant was one of several named in the Will of James L. Boswell, who died August 18, 1983 (about 3 months after Nora Eichorn Boswell). This should have no relevance to this suit for fees and is not mentioned in the opinion of the 14th Court of Appeals. Amounts received by Appellant under the Will of Mr. Boswell do not satisfy the contract debt of Nora Eichorn Boswell--and surely cannot excuse the violation of the rights of Nora Eichorn Boswell under unconstitutional guardianship

statutes and Court practice, which deny federal Due Process and Equal Protection of law, as guaranteed by the 14th Amendment of the United States Constitution.

Appellee Allied Bank placed the Will in the Record and implies the Will is evidence of impropriety (of which there was none), and proof that Beverly Breaux was the Attorney of James Boswell (though it proves just the opposite). The Will (R. 102) itself explains the gifts made and identifies Beverly L. Breaux as the Attorney of Nora Eichorn Boswell and James Hippard as the Attorney of James Boswell.

THE QUESTION IS SUBSTANTIAL

Rights of Elderly Affluent Citizens.

This is a highly significant case, which presents a substantial question, pertaining to the fundamental rights of elderly affluent citizens. The implications of this case go far beyond the parties

involved. This case has already been used as precedent, by the State Bar of Texas, in a disbarment action in another county. (See p. 54, infra)

In the event of illness or injury, elderly persons, with property, become takeover-targets for relatives, who are eager to gain control of them and their estates, often with little or no regard for their preferences as to how, where, and with whom, they wish to spend their final days. Where family relationships are close and caring, families usually resolve matters without involving a Court. Where family relationships are distant or adverse (as in the Eichorn case) a Court is more likely to become involved. It is frightening to realize that unconstitutional laws (Texas Probate Code §§131, 419) and Court practice (dual Attorney and Guardian appointments) aid such takeovers and

actually give statutory preference to such relatives, though there may be non-relatives who have closer, more valued, relationships with those elderly affluent persons.

The problem is sufficiently widespread that it was the subject of an Ann Landers column in which concern, based upon years of observation, was expressed over "our legal system" by a nursinghome worker:

> **** It is much too easy for family members, doctors and lawyers to take away the rights of our elderly. Usually it happens to someone who is financially well off.****
>
> The person has an acute illness or accident that requires rehabilitation in a care facility after hospitalization. That person may be temporarily confused. ****
>
> The physician writes a letter, the family gets a lawyer, and they go to court****. It amazes me the way two or three people can say someone is incompetent and that person's rights are gone forever.
>
> I have seen residents change doctors, change lawyers and make an effort

> to regain control of their lives, but they fail because the relatives stick together with their eyes on the money. I have seen affluent residents unable to get personal spending money because everything is "tied up".
>
> Please tell us how we can help these people and also how we can protect ourselves from being victimized in this way.--Concerned in Chicago
>
> "Don't Wait Until Your Mind Gets Cloudy", Ann Landers, Houston Chronicle, Oct 11, 1984, Sec. 5, p. 2.

If left unreversed, the Texas judgment and opinions, in this case, stand for the proposition that elderly affluent citizens, who, without prior notice or adversary hearing, become subject to temporary guardianship proceedings, have fewer rights than any other classification of United States citizen (whether accused criminal, proposed mental patient, mentally retarded, juvenile, or other).

For Temporary Wards:

1. There is instant loss of all rights

in ex-parte hearing, of which there is no prior notice.

2. An Attorney ad litem may also be a Temporary Guardian and may abandon his conflicting role as advocate.

3. There is no real right to a true advocate who is an independent, retained counsel, because such counsel must run the risk of:

   a) non-payment of fees
   b) disciplinary actions by Bar
   c) conflict with Attorney ad litem.

4. New trial may be ordered, after a favorable jury verdict.

So that long life and wealth may be blessings, rather than curses, in our final days, it is essential that elderly affluent citizens, subject to guardianship proceedings, are accorded, at least, the minimum Due Process (a true advocate) and Equal Protection (freedom from New Trial after favorable jury verdict) that is guaranteed to all citizens under the 14th Amendment of the United States Constitution.

Recent Legislation.

America is aging; the "over 80" is the fastest growing age group. Senior citizens have acquired a voice, which is being heeded by legislators. This is demonstrated by Probate Code changes passed by Texas legislators, after the death of Nora Eichorn Boswell:

a. Effective Sep 1, 1983:

§130A thru O (App. A42), which had pertained to Limited Guardianships only for the Mentally Retarded, was expanded to mentally or physically "Incapacitated Persons", who shall not be presumed to be incompetent and shall retain all legal and civil rights and powers, except those specifically granted to the Limited Guardian. The Incapacitated Person is "entitled to be represented by counsel." The Court shall ascertain and give due consideration to the

preferences of the Incapacitated Person, regarding the appointment of a "suitable person" as Limited Guardian.

This amended statute thus recognized, that incompetence can be physical, as well as mental, and a question of degree, rather than a yes-or-no matter. It also omitted statutory preference for relatives as Guardians (which is no longer a reasonable preference in our mobile society).

b. Effctive May 26, 1985:

§131 (App. A44) pertaining to Temporary Guardianship, deleted "person of unsound mind" and substituted "incapacitated person as defined in Section 130A", pertaining to Limited Guardianship; added needed due process protections (written application, hearing within 10 days, 60 day time limit, representation by counsel), making it

clear that a Temporary Ward possesses the contract right and power to "retain" necesary services of "independent counsel." If there is no independent counsel, then an atttorney shall be appointed.

§118A (App. A48), a new provision entitled "Designation of Guardian Before Need Arises", not only allows a person to designate a Guardian (as Nora Eichorn had done in Paragraph 6 (p. 22, supra) of the Power of Attorney drafted by Appellant), but also to disqualify named persons who may not be appointed under any circumstances (a Missouri nephew, for example).

Though very good for elderly affluent citizens, this recent legislation does not go far enough. There still remains:

a) §419, under which a New Trial may

be ordered after verdict favorable to the Ward, or proposed Ward, and

b) Court practice of appointing the same person as both Attorney ad litem and Temporary Guardian of Person.

This statute and this Court practice can clearly work to the detriment of elderly affluent citizens and to the diminution of their estates. Instead of a blessing, they make of wealth a liability, an albatross, which for Nora Eichorn Boswell led to deprivation of rights and actual imprisonment in a nursinghome (June to November 5, 1982), during what were supposed to be her "golden years."

Unresponsive Courts.

Though Texas legislators have begun responding to the needs and demands of our senior citizens, these judgments and opinions of the Texas Courts, in this case, demonstrate that the Courts have yet to respond, and in the absence of

guidance from the Supreme Court of the United States, are unlikely to do so.

Appellant's services were rendered in accordance with the wishes of Nora Eichorn Boswell to remain in Houston, Texas and spend her final days with her close friend and husband, James Boswell. The services were rendered under an outdated Probate Code, but correctly anticipated the legislative revisions of that Code, which became effective after her death. In seeking reversal of the Probate Court's Summary Judgment, the 1983 legislation was cited to the 14th Court of Appeals; both the 1983 and 1985 legislation was cited to the Supreme Court of Texas; all to no avail. The 1985 revision of §131 (which added Due Process protections and now recognizes the right and power of a Temporary Ward to "retain" "independent counsel"), is the strongest

evidence that the prior §131 was constitutionally defective, and therefore, could not be the basis upon which Nora Eichorn was stripped of contract and other fundamental rights.

Apellant's services, through the original jury verdict, have been compensated. Compensation stopped, when Appellant began objecting to denial of Due Process and Equal Protection to Ms. Eichorn under an unconstitutional guardianship statute (§419, New Trial) and Probate Court practice (dual appointment as Attorney ad litem and Temporary Guardian of Person).

If the state has no compelling interest in a new trial, after jury verdict favorable to accused criminals and proposed mental patients, it surely has no such compelling interest after such verdicts for guardianship Wards. The individual's right of self-determination and right

to be left alone, outweigh any possible state interest. The labeling of the proceeding as "civil" and invoking the parens patriae (state as Guardian) rationale has already been rejectd by this Court as a valid basis for denying fundamental constitutional rights. In re Gault, 387 U.S. 1, 17-21, 36 (1967) (re juveniles).

Clearly, Mr. Cenatiempo resolved the conflict due to his appointments as both Guardian-Caretaker and Attorney-Advocate, by abandoning his role as Advocate. Given Ms. Eichorn's impaired language skills and the restricions placed upon her mobility by Mr. Cenatiempo, Ms. Eichorn had no real access to any Attorney-advocate, other than Apellant Beverly Breaux. The 14th Court of Appeals suggestion of "unclean hands," (App. A24) for having received partial payment for

total services rendered, is a conclusion that Nora Eichorn had no right to <u>any</u> true advocate--not even Beverly Breaux.

It is under the guardianship statutes that elderly affluent citizens are likely to have their fate decided.

Note: The elderly poor are more likely to have their cases placed upon the Mental Health docket. The Texas Mental Health Code contains admirable Due Process protections; there is right to counsel and no new trial after verdict favorable to the proposed Mental Patient.

The opinion of the 14th Court of Appeals, in this case, would make the rights of the Ward dependent upon the particular procedure selected by the applicant for guardianship (App. A14):

> **** Eichorn was placed under a temporary guardianship and not a limited guardianship. The two procedures are separate and independent.

The enlightened Due Process legislation embodied in amended §130A thru O (Limited

Guardianship) and §131 (Temporary Guardianship) can easily be avoided by the Applicant's selection of a Permanent Guardianship. In fact, "to go directly with a permanent guardianship" appears to be the suggestion of the staffs of the Houston Probate Courts, now that Temporary Guardianships will "involve more time, more expenses and more potential attorney liability than before." (App. A50, Houston Bar Association, Section of Probate, Trust and Estates Newsletter, Sept 1, 1986)

Texas Permanent Guardianship statutes are principally 1955 enactments, to which the most recent addition, adopted in 1977 was §113A (App. A40), which provides for a discretionary appointment of an Attorney ad litem. (This was the statute under which Mr. Cenatiempo was appointed to represent Nora Eichorn.) There is no

provision for independently retained counsel, and experienced guardianship attorneys are unlikely to accept such clients (except by Court appointment) for fear of (1) non-payment, and (2) disciplinary action by the State Bar.

Elderly citizens who become subject to guardianship procedings will usually have become sick or injured and will likely have no real, physical access to independent counsel. Therefore, counsel, if any, will usually be Court-appointed. Given that Temporary Wards and proposed Permanent Wards are likely to be represented, if at all, by Court appointed counsel, it becomes all the more important:

1. that the Attorney ad litem have no deterent to his serving as a true advocate--such as a conflicting appointment also as Guardian-caretaker, and

2. that Wards be free from the granting of new trials (under §419 Texas Probate Code) after jury verdicts that are

favorable to them.

These minimum Due Process and Equal Protection measures assume very great importance in protecting the fundamental rights of elderly affluent citizens, under the Texas legal system.

State Bar Disciplinary Suit.

Just as the Courts have failed to respond to the needs and demands of the elderly affluent citizens, so have the officers of the Court: the State Bar. This is demonstrated by Texas State Bar suits seeking disbarment of attorneys who dare to render services requested by elderly Temporary Wards, thus interfering with established guardianship tradition.

In this derivative suit for fees, the original Opinion of July 16, 1985 of the 14th Court of Appeals was unpublished. The State Bar of Texas filed Motion (App.

A30) seeking publication for use in a Grayson County disciplinary action against Attorney Stephen F. Hefner who, according to television and newspaper reports, served an elerly Temporary Ward. Said Motion was granted. Attorney Stephen F. Hefner was disbarred by 15th District Court of Grayson County, Texas,effective September 17, 1985. (Texas Bar Journal, Jan. 1986, page 64.) (Effective May 26, 1985, amended §131, Texas Probate Code, recognized a Temporary Ward's right to independently retained counsel.)

Such State Bar suits, seeking disbarment of attorneys who have represented Temporary Wards, presume that elderly Temporary Wards have no right of contract, and that Temporary Guardians have disaffirmed their contracts for legal services of independent counsel, to resist the guardianship being imposed upon them and their estates. (See

State Bar Motion, App A30)

The legislature is moving in the direction of recognition and protection of the rights of the elderly affluent citizens; the Courts, and State Bar of Texas obviously are not. The Courts, and State Bar of Texas are in need of guidance from the Supreme Court of the United States.

New Question.

The question presented by this case has not previously been considered by this Court. No doubt, because it is only recently that America has been faced with the new problems that are presented by a growing, elderly affluent population; and also, because elderly Wards:

a) die, as Nora Eichorn Boswell died, before their constitutional claims can be brought to this Court, and

b) are seldom represented by true advocates, who will pursue such appeals.

If the constitutional claims of elderly affluent citizens are not heard in the context of suits by their "independent" attorneys to collect fees--their federal claims are unlikely ever to be heard by this Court.

What we sow, we reap. What we do now to, or for, our elderly, we do eventually to, or for, ourselves.

CONCLUSION

For these reasons, this Court should at least note probable jurisdiction of this appeal. However, the judgment below is so plainly and blatently wrong, that there should be summary reversal, with per curiam opinion, voiding the challenged statutes and court practice, and remanding with direction to enter Summary Judgment, with interest, for Appellant Beverly L.

Breaux, based upon her completed contract with Nora Eichorn (Boswell).

Respectfully submitted,

_____

Beverly L. Breaux
10440 Valley Forge, Suite 224
Houston, Texas 77042
(713) 789-1613

Attorney pro se,
for Appellant

October____, 1986

CERTIFICATE OF SERVICE

I, a member of the Bar of the Supreme Court of the United States, hereby certify that on the ____day of October 1986, 3 copies of this Jurisdictional Statement were served by delivery to Attorney for Appellee, Ms. Linda Kelly, Butler and Binion/Dinkins and Kelly, 4700 Interfirst Plaza, 1100 Louisiana, Houston, Tx 77002; and by certified mail, postage prepaid, to Attorney General Jim Mattox, P.O.Box 12548, Austin, Texas 78711

I further certify that all parties required to be served have been served.

Beverly L. Breaux
10440 Valley Forge, Suite 224
Houston, Texas 77042

(713) 789-1613

APPENDIX

PARTIES AND PARTICIPANTS

Those involved in the contested guardianship action and this derivative suit to collect Attorney fees:

1. Nora Eichorn (Boswell), Client of Appellant, Attorney Beverly L. Breaux, then Temporary Ward of Probate Court #3. She died, in Houston, Texas, at age 86 on May 17, 1983.

2. Beverly L. Breaux, Appellant, Attorney, hired by Nora Eichorn, age 84, at Bank of Houston May 19, 1981, serving Nora Eichorn Boswell until her death May 17, 1983.

3. James L. Boswell, 1st Temp. Guardian of Person and Estate, appointed Friday June 26, 1981, upon application filed by Beverly L. Breaux, during 3-week June-July 1981 hospitalization of Nora Eichorn with stroke-like illnes, which left her with impaired language skills (aphasia). He died in Houston, Texas at age 88 on August 18, 1983.

4. Robert A. Crow, Missouri nephew of Nora Eichorn, applicant for appointment as Guardian in Probate Court #2, then contestant to Boswell appointment in Probate Court #3.

5. Judge Jim Scanlan of Probate Court #3, where original guardianship application was filed and granted.

6. Percy Foreman of FOREMAN, DeGUERIN & DeGUERIN, Attorney for nephew Robert A. Crow of Missouri, who filed on Monday June 29, 1981 in Probate Court #2 (Judge Pat Gregory, presiding) the original Crow Application for guardianship (transferred by Beverly L. Breaux to Probate Court #3, when Application was discovered).

7. Tom F. Coleman, Jr. and Rae V. Calvert of ABLE & COLEMAN, P.C., Attorneys for Percy Foreman and nephew Robert Crow, who filed the Crow contest of the Boswell appointment and re-application for Crow's appointment as Guardian in Probate Court #3.

8. Michael J. Cenatiempo of WYCKOFF, RUSSELL, DUNN & FRAZIER, Attorney ad litem for Nora Eichorn, then (by Agreed Order for a 60 day continuance, expiring October 27, 1981) 2nd Temp. Guardian of the Person of Nora Eichorn.

9. Allied Bank of Texas, Appellee, (by Agreed Order for a 60 day continuance, expiring October 27, 1981) 2nd Temp. Guardian of the Estate of Nora Eichorn.

10. Linda Kelly of BUTLER & BINION, then of DINKINS & KELLY, Attorneys for Allied Bank of Texas, 2nd Temp. Guardian of Estate.

11. James J. Hippard, Sr., University of Houston professor of law, Attorney for James L. Boswell, after mistrial of November 24, 1981 when Boswell was told by Judge Scanlan to obtain counsel.

12. Thomas R. Conner of SMITH & CONNER, Attorney for Michael J. Cenatiempo and Allied Bank of Texas, who filed suit in 247th Dist. Court for purported 2nd Temp. Guardians, upon Judge Scanlan's instruction that suit be filed "to dissolve" the marriage of Nora Eichorn and James Boswell.

13. Judge Bruce Wettman, Referee Bill Morris, Referee Thomas O. Stansbury of 247th Dist. Court, the Family Law Court where suit was filed by purported 2nd Temp. Guardians, "to dissolve" the marriage.

14. Brent L. Burg of JOE H. RENTZ & ASSOC. Attorney ad litem for Nora Eichorn Boswell, appointed by Referee Stansbury, of the 247th Dist. Court, after Motion of Beverly L. Breaux citing the conflicts between 2nd Temp Guardians and their Ward, Nora Eichorn Boswell, who did not want her marriage dissolved.

15. Ronald Cohen and Linda Synnott of FINGER, SMALL, COHEN, FORLANO & SYNNOTT, Probate Court Attorneys for Plaintiff-Appellant Beverly L. Breaux

16. State Bar of Texas, Movant in 14th Court of Appeals, seeking publication of unpublished Opinion of July 18, 1985, for use in disciplinary action in another county, against attorney for an elderly Temporary Ward, whose Temporary Guardian supposedly disaffirmed the contract. (Attorney Hefner disbarred, effective Sept 17, 1985.).

SUPREME COURT OF TEXAS
P. O. Box 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

March 5, 1986

Ms. Beverly L. Breaux
10440 Valley Forge,Suite 224
Houston, Texas 77042

Ms. Linda L. Kelly
Butler & Binion
1600 Allied Bank Plaza
Houston, Texas 77002

Re: Case No. C-4848

STYLE: BEVERLY L. BREAUX, ATTORNEY FOR NORA EICHORN BOSWELL v. ALLIED BANK OF TEXAS, SECOND TEMPORARY GUARDIAN OF ESTATE OF

Dear Counsel:

Today, the Supreme Court of Texas refused the above referenced application for writ of error with the notation, No Reversible Error. Justices Wallace and Kilgarlin not sitting.

Respectfully yours,

Mary M. Wakefield, Clerk
By /s/ Blanca E. Morin

SUPREME COURT OF TEXAS
P. O. Box 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

July 16, 1986

Ms. Beverly L. Breaux
10440 Valley Forge, Suite 224
Houston, Tx 77042

Ms. Linda L. Kelly
Butler & Binion
1600 Allied Bank Plaza
Houston, Tx 77002

Re: Case No. C-4848

STYLE: BEVERLY L. BREAUX, ATORNEY FOR NORA EICHORN BOSWELL v. ALLIED BANK OF TEXAS, SECOND TEMPORARY GUARDIAN OF ESTATE OF NORA EICHORN (BOSWELL)

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case. Petitioner's motion for leave to amend motion for rehearing is granted. (Justices Wallace and Kilgarlin not sitting.)

Respectfully yours,

Mary M. Wakiefield, Clerk
By /s/ Peggy Littlefield,
Chief Deputy

No. C-4848
In the Supreme Court of Texas

(filed July 29, 1986)

Beverly L. Breaux, ****
vs.
Allied Bank of Texas, ****

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Beverly L. Breaux, the Petitioner above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Texas entered July 16, 1986, overruling Petitioner's Motion for Rehearing on Application for Writ of Error, which said Court refused on March 5, 1986, with the notation "No Reversable Error" contained in the Substituted Opinion entered September 26, 1985, by the Court of Appeals for the Fourteenth Supreme Judicial District of Texas at Houston, Texas.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

/s/ Beverly L. Breaux,
****

Certificate of Service

I, Beverly L. Breaux, a member of the Bar of the Supreme Court of the United States, hereby certify that on July 28, 1986 copy of the foregoing Notice of Appeal to the Supreme Court of the United States, was delivered to the offices of:

--Ms. Linda L. Kelly, Butler & Binion, 1600 Allied Bank Plaza, Houston, Texas 77002, counsel for Respondent;

--Clerk of the Court of Appeals for the Fourteenth Supreme Judicial District of Texas at Houston, Texas, as the Court possessed, or to become possessed of the record, 15 days following July 16, 1986, under Rule 484, Texas Rules of Civil Procedure.

I further certify that all parties required to be served have been served.

/s/ Beverly L. Breaux

COURT OF APPEALS
14th Supreme Judicial District
1307 San Jacinto, 11th Floor
Houston, Texas 77002

September 26, 1985

No. C14-84-791CV

Beverly L. Breaux,
Attorney for Nora Eichorn Boswell,
Appellant
v.
Allied Bank of Texas,
Second Temporary Guardian of Estate
of Nora Eichorn (Boswell),
Appellee

Appeal from Probate Court No. Three
of Haris County
Trial Court No. 172210-401

JUDGMENT

"This cause, an appeal from the summary judgment in favor of ALLIED BANK OF TEXAS signed August 29, 1984, came on to be heard on the transcript of the record. We have inspected the record and find no error in the judgment. We therefore affirm the judgment of the Court below.

We order BEVERLY L. BREAUX and her Surety, GENERAL INDEMNITY INSURANCE COMPANY,

to pay all costs incurred by reason of this appeal.

This decision is ordered certified below for observance."

Affirmed, Opinion of July 18, 1985, Withdrawn and Substituted Opinion filed September 26, 1985.

OPINION

This is an appeal in a guardianship proceeding. The trial court granted a summary judgment denying Appellant Beverly Breaux, recovery of attorney's fees for legal services allegedly provided to Nora Eichorn. Appellant raises eleven points of error arguing that the trial court erred in granting the summary judgment in favor of Appellee, Allied Bank of Texas, Second Temporary Guardian of the Estate of Nora Eichorn (Boswell), N.C.M. We affirm.

In May 1981, Eichorn and Breaux entered into a contract for legal services. Those

services were for estate planning. On June 17, 1981, Eichorn was hospitalized for a stroke-like condition which left her mentally and physically impaired. After Eichorn's hospitalization, Breaux prepared James Boswell's application to be named Eichorn's temporary guardian. That application stated that Ms. Eichorn was "unable to handle day-to-day affairs, care for herself, or to do those things necessary to protect and preserve her property." In response to this application, on June 26, 1981, Boswell was named Eichorn's temporary guardian. After Boswell was appointed, Breaux claims that Eichorn requested that additional legal services be performed.

On September 2, 1981, the Probate Court, with appellant's agreement, entered an order appointing Allied Bank as temporary guardian of Eichorn's estate and Michael Cenatiempo as temporary guardian of Eic-

horn's person. That agreed order also provided that "the appointments of Allied Bank of Texas and Michael J. Cenatiempo as Temporary Guardians shall terminate on October 27, 1981 unless otherwise ordered by this court."

On November 3, 1981, James Boswell filed an application for payment of attorney's fees to Appellant through October 31, 1981. In her affidavit of April 16, 1984, Appellant acknowledged she had been paid for services rendered through October 31, 1981.

Apellant presented claims for attorney's fees to Allied Bank covering the period from November 1, 1981, to May 31, 1983, alleging that she was Eichorn's attorney. Allied Bank refused to pay the claims. Appellant then filed suit on the rejected claims on September 15, 1983. After filing its answer, Appellee filed a Motion for Summary Judgment requesting Appellant

take nothing. Breaux filed a response to that motion and a Cross-Motion for Summary Judgment. The trial court found that the following material facts were without dispute and entitled Allied Bank to judgment as a matter of law:

1) Throughout the period for which Plaintiff seeks compensation for legal services rendered to Nora Eichorn, Ms. Eichorn had duly appointed, qualified, and acting Temporary guardians of her Person and Estate. Plaintiff approved this Court's Agreed Order dated 2 September 1981 which appointed such Guardians.

2) The Temporary Guardian of the Person of Nora Eichorn and the Temporary Guardian of the Estate of Nora Eichorn did not authorize the services for which Plaintiff seeks compensation nor did they accept the benefits of such services on behalf of Nora Eichorn.

3) On 25 June 1982 when Plaintiff first sought court approval for the compensation for which she now sues, the Temporary Guardians of the Person and

Estate of Nora Eichorn disaffirmed any contract for legal services between Plaintiff and Nora Eichorn.

The trial court entered judgment that

Breaux take nothing by her suit.

Appellant raises eleven points of error. Under point of error one, Appellant argues that the trial court erred in granting Allied Bank's Motion for Summary Judgment "because Nora Eichorn Boswell was not a Permanent Ward without rights, but was a Temporary Ward, who fully retained presumption of competence, all contract rights and all constitutional rights, including the right to an Attorney of her choice to defend those rights."

Appellant equates a temporary guardianship with a limited guardianship. Appellant argues that under a "limited guardianship" Eichorn retained the power to enter into the alleged contract. Effective September 1, 1983, four months after Eichorn died, the Probate Code was amended to allow limited guardianships for incapacitated persons. Under the limited guardianship procedure, an incapacitated person

is not presumed to be incompetent and retains all legal and civil rights and powers except those granted to the limited guardian. TEX. PROB. CODE ANN. §130A (Vernon 1983). However, Eichorn was placed under a temporary guardianship and not a limited guardianship. The two procedures are separate and independent.

Appellant also argues that Eichorn's "legal presumption of general competence was never finally overcome by a final decree of incompetence." We agree that there has been no final adjudication of incompetence. However, a guardian may be appointed if the court finds that the person for whom a guardian is to be appointed is a person of unsound mind. TEX. PROB. CODE ANN. §114 (Vernon Supp. 1985). Since Appellant prepared the original application for guardianship, Appellant cannot now argue that the entire guardianship was improper because Eichorn

was not a person

of "unsound mind."

Appellant contends that Eichorn retained the legal presumption of competence to marry and "thus competence to retain counsel to defend her decision to remain in Houston and to marry." Whether Eichorn had the competence to marry is irrelevant; the issue is whether a ward may effectively contract for legal services while a temporary guardianship exists.

Eichorn was not a ward under a limited guardianship who retained all legal and civil rights and powers. TEX. PROB. CODE ANN. §130A (Vernon Supp. 1985). She was placed under a temporary guardianship. The order which established that guardianship named Jim Boswell as temporary guardian of the person and estate of Nora Eichorn, N.C.M. with "the power to collect, conserve, protect, manage and maintain

the assets belonging to the Ward...."

The agreed order naming Allied Bank as temporary guardian of the estate gave Appellee the following powers:

1. To gather, collect, take possession of, preserve and protect all property or other assets of every kind, real, personal or mixed, belonging to the Ward;

2. To arrange for and to pay expenses necessary for the protection, maintenance, support and upkeep of the Ward and all property coming into possession of said Temporary Guardian;

3. To accept claims of creditors and approve or disapprove such claims as may be presented to such Guardian, and to classify any claims which may be approved.

With these powers, Appellee and not the ward had the power to contract for legal services. The ability to contract for legal services was incident to the other powers granted to Appellee. Eichorn no longer had the power to bind herself and her estate to pay Appellant's fees. There is nothing in the record to show Appellee requested any services from Appellant.

The Second Restatement of Contracts provides "A person has no capacity to incur contractual duties if his property is under guardianship by

[-4-]

reason of an adjudication of mental illness or defect." Restatement (Second) of Contracts §13 (1981). The trial court was correct in concluding that the same rule aplies to persons of unsound mind who are placed under the protection of a temporary guardianship of both the estate and person. Point of error one is overruled.

The second point of error is that the trial court erred in granting the summary judgment on the basis of the finding that Eichorn had duly appointed temporary guardians of her person and estate. Appellant argues there is no evidence to support such a finding. The order which originally named Appellee as temporary guardian

of Eichorn's estate provided that the appointment "shall terminate on October 27, 1981 unless otherwise ordered by this Court." On January 5, 1982, the trial judge signed an order entitled "Order Extending Appointment of Temporary Guardian." That order provides that on the 27th day of October 1981, the court heard Appellee's application for extension of its appointment as temporary guardian of the Estate of Nora Eichorn, N.C.M. The trial court ordered that the original agreed orders appointing Appellee "be extended until otherwise ordered by this Court." Appellant argues "the order purporting to extend the appointment can only be an order making a new appointment." Appellant then concludes that Eichorn was left without "a Temporary Guardian of Estate, duly appointed 'by written order,' from termination on October 27, 1981, until the new appointment

was made on January 5, 1982...."

We agree that appointments of temporary guardians are to be made by written orders. TEX. PROB. CODE ANN. §131(a) (Vernon 1980). However, Appellee was originally appointed by a written order and the appointment was continued by a written order. Appellant has not established that the appointment had terminated.

[-5-]

Point of error two is overruled.

The third point of error is that the finding that there were duly appointed temporary guardians "is immaterial as Nora Eichorn retained all her rights." As stated above, Allied Bank as temporary guardian has the power and duty to protect and collect Eichorn's assets. With that power Allied Bank, and not Eichorn, had the responsibility to hire attorneys to perform any needed legal work. During the pendency of the guardianship, any

contract for legal services would have to be made with the guardian and not the ward. Point of error three is overruled.

Point of error four is that the finding that the temporary guardians did not authorize or accept Appellant's services on behalf of Eichorn is a disputed fact issue which precludes summary judgment. There are affidavits attached to the Motion for Summary Judgment in which both a representative of Allied Bank and Cenatiempo state that they have neither authorized nor accepted any legal services from Appellant. There is no evidence in the record that such legal services were authorized or accepted by the temporary guardians. Appellant has failed to establish that a material factual issue existed which would preclude the granting of the summary judgment. TEX. R. CIV. P. 166-A(c). Point of error four is overruled.

The fifth point of error is that the

lack of authorization is immaterial because: 1) the temporary guardians ratified the contract by inaction, and 2) Nora Eichorn had all her rights, and she authorized and accepted the services. The record establishes that Appellee promptly opposed Appellant's application for payment of attorney's fees for representation of Eichorn. There is no evidence of ratification. There is no merit to Appellant's contention that the trial judge in any way authorized or accepted the legal services of Appellant. As stated above, while under the protection of the guardianship, Eichorn could not authorize

[-6-]

or accept the legal services. Point of error five is overruled.

Point of error six attacks the finding that the temporary guardians of the estate and person disaffirmed the contract between Appellant and Eichorn. Point of

error seven is that Appellee lacked the power to disaffirm. Appellant argues that the temporary guadians did not actually disaffirm but made an erroneous denial. Appellant does not dispute that a guardian may disaffirm a contract entered into by the ward. See Knox v. Drews, 202 S.W.2d 335 (Tex.Civ.App. - Austin 1947, writ dism'd). The act of disaffirmance must be distinct and unequivocal. Hatton v. Bodan Lumber Co., 123 S.W. 163, 168 (Tex. Civ.App. 1909, writ ref'd). The trial court was correct in finding that the acts of Appellee were so distinct and unequivocal as to act as a disaffirmance of the contract. Appellee's Opposition to Application For Attorney's Fees served as a disaffirmance. Appellee had the power to disaffirm the contract allegedly made while the ward was under the guardianship. There is no legal suport for Appellant's argument that the action

of the trial court in abating the hearing of the application for payment served as an acceptance of the services. Point of error six and seven are overruled.

Point of error eight is that the contract for legal services was a contract for necessaries which could not be disaffirmed. We agree that the law creates an obligation to pay the reasonable value for necessaries furnished to a ward and those necessaries may include legal serices. Ferguson v. Fitze, 173 S.W. 500 (Tex.Civ.App. - Galveston 1914, writ ref'd).

[* see **Deletion** infra A27]

Appellant has failed to show any of the alleged legal services rendered were "necessaries." Point of error eight is overruled.

The ninth point of error raises the issue of whether Apellant was entitled

to compensation under a quantum meruit theory. Recovery under quantum meruit or a quasi-contract theory is based on equity. When seeking an equitable remedy a party must do

[-7-]

equity and come to the court with clean hands. Houston Lighting and Power Co. v. Dickinson Independent School District, 641 S.W.2d 302 (Tex.App. - Houston [14th Dist.] 1982, writ ref'd n.r.e.). Appellant did not "come to the court with clean hands." Appellant recovered from the estate for legal services rendered to James Boswell as temporary guardian. Then Appellant asserted that Eichorn and not Boswell was her client. Appellant knew the temporary guardians of the estate and person had been appointed. However, Appellant continued to provide services at the "request" of a person for whom Appellant had initiated temporary guardian-

ship proceedings. Appellant was not entitled to any equitable relief. Point of error nine is overruled.

Point of error ten is that the summary judgment was improper because the original petition presented a suit on a sworn account and Appellee's original answer was an unsworn denial. If Appellant's suit was not filed in the form required by Rule 185, Appellee's answer was not required to conform to the rule. Howard v. Weisberg, 583 S.W.2d 920 (Tex.Civ.App. - Dallas 1979, no writ). An affidavit supporting a suit on a sworn account must state "that all just and lawful offsets, payments and credits have been allowed..." TEX. R. CIV. P. 185. Appellant's affidavit only contains the statement that "all lawful offsets, payments, and credits have been allowed." Since Appellant has failed to strictly comply with the requirements of Rule 185, Appellee's answer

was not required to conform to the rule. Point of error ten is overruled.

Point of error eleven is that the trial court erred in failing to file separate Findings of Fact and Conclusions of Law. This is an appeal from the granting of a summary judgment. Findings of fact and conclusions of law have no place in a summary judgment proceeding. State v. Easley, 404 S.W.2d 296, 297 (Tex. 1966); Fulton v. Duhaimi, 525 S.W.2d 62, 64 (Tex. Civ.App.

[-8-]

- Houston [1st Dist.] 1975, writ ref'd n.r.e.). The trial court was correct in not making findings of fact and conclusions of law. Point of error eleven is overruled.

The judgment is affirmed.

/s/ Paul C. Murphy
Associate Justice

Judgment Rendered and Opinion filed Sep-

tember 26, 1986. Panel consists of Associate Justices Murphy and Draughn.

*** DELETION**

Deleted, as noted supra A23, from the original Opinion of July 18, 1985:

> However, Appellant has failed to show that the services she performed were "necessaries." If as Appellant alleges, there was a conflict between Mr. Cenatiempo's dual roles as attorney ad litem and temporary guardian of the person, Appellant should have formally raised the question. In addition, Appellant agreed to Cenatiempo's appointment as temporary guardian.

COURT OF APPEALS
14th Supreme Judicial District
1307 San Jacinto, 11th Floor
Houston, Texas 77002

September 26, 1985

(Names & Addresses omitted)

Re: Case No. 14-84-00791-CV
Trial Court Case No. 172210-401

STYLE: Breaux, Beverly L., Attorney***
V: Allied Bank ***

Counsel:

Please be advised that, on this date, the Court OVERRULED appellant's(s') motion for rehearing in the above cause.

Further, if no second motion for rehearing is filed, application for writ of error, if any, must be submitted on or before Monday, October 28, 1985.

Respectfully yours,
MARY JANE SMART, CLERK
By /s/ Charlene Mitchell
Deputy

Hon. Adele M. Winn
Assistant General Counsel
State Bar of Texas
P. O. Box 12487
Austin, TX 78711

COURT OF APPEALS
14th Supreme Judicial District
1307 San Jacinto, 11th Floor
Houston, Texas 77002

September 26, 1985

(Names & Addresses omitted)

Re: Case No. 14-84-00791-CV
Trial Court Case No. 172210-401

STYLE: Breaux, Beverly L., Attorney***
V: Allied Bank***

Counsel:

Please be advised that the Court today GRANTED the request to publish this Court's opinion in the above cause.

Respectfully yours,
MARY JANE SMART, CLERK
By /s/ Charlene Mitchell
Deputy

Hon. Adele M. Winn
Assistant General Counsel
State Bar of Texas
P. O. Box 12487
Austin, Texas 78711

No. C14-84-791CV

IN THE
COURT OF APPEALS
FOR THE
14th SUPREME JUDICIAL DISTRICT OF TEXAS

BEVERLY L. BREAUX
ATTORNEY FOR NORA EICHORN BOSWELL
Appellant
v.
ALLIED BANK OF TEXAS, SECOND TEMPORARY GUARDIAN OF ESTATE OF NORA EICHORN (BOSWELL)
Appellee

MOTION FOR PUBLICATION OF OPINION

TO THE HONORABLE COURT OF APPEALS:

NOW COMES the State Bar of Texas, Movant, and files this its motion for publication of the Court of Appeals' opinion and in support thereof would show the following:

I.

This Court delivered an opinion in this case on July 18, 1985. In that opinion, the Court considered the issue of whether a ward may effectively contract for legal services while a temporary guardianship exists. It applied the rule that

a guardian may disaffirm a contract entered into by a ward to contract for legal services. The opinion also contains discussion of the quantum meruit theory of recovery by an attorney seeking legal fees for the representation of a person under guardianship. The Court determined not to publish that opinion under Tex. R. Civ. P. 452

II.

Movant represents the Petitioner in the State Bar of Texas v. Stephen F. Hefner, Cause No. 102,748 in the Fifteenth Judicial District Court of Grayson County, Texas. That case is an attorney disciplinary action in which it is alleged that Mr. Hefner performed and collected fees for legal services for a ward whose guardian disaffirmed the contract. The Court of Appeals' decision in this case, particularly those portions of the decision noted in paragraph I above, concerns is-

sues in the Hefner litigation and will be of precedential value in that case.

WHEREFORE, PREMISES CONSIDERED, Movant requests that the Court reconsider its decision and order that this opinion be published.

Respectfully submitted,
Jerry L. Zunker
General Counsel

Adele M. Winn
Assistant General Counsel

Ofice of the General Counsel
State Bar of Texas
P.O.Box 12487
Austin, Texas 78711
(512) 475-2288

By /s/ Adele M. Winn
State Bar Card No. 21775400

ATTORNEYS FOR MOVANT

(Certificate of Service Omitted)

Served: August 12, 1985

PROBATE COURT NO. 3
OF
HARRIS COUNTY, TEXAS

August 29, 1984

GUARDIANSHIP OF THE ESTATE
OF NORA EICHORN, N.C.M.

BEVERLY L. BREAUX
V.
ALLIED BANK OF TEXAS,
TEMPORARY GUARDIAN OF THE
ESTATE OF NORA EICHORN, N.C.M.

ORDER GRANTING SUMMARY JUDGMENT

On 27 April 1984 the Court heard the Motion for Summary Judgment filed herein by Defendant, Allied Bank of Texas, Houston, Texas, against Plaintiff in this cause, Beverly L. Breaux. It appears to the Court that such Motion has been made in proper form and time, has been properly served upon Plaintiff, and that Plaintiff was properly notified of the hearing on such Motion. After considering Defendant's Motion, the pleadings in this cause, the affidavits filed with Defendant's Motion, and Plaintiff's Response

to Defendant's Motion, as well as arguments of counsel, the Court finds that there is no genuine issue of any material fact and that Defendant is entitled to judgment as a matter of law. The Court finds that the following material facts are without dispute and entitle Defendant to judgment as a matter of law:

(1) Throughout the period for which Plaintiff seeks compensation for legal services rendered to Nora Eichorn, Ms. Eichorn had duly appointed, qualified, and acting Temporary Guardians of her Person and Estate. Plaintiff approved this Court's Agreed Order dated 2 September 1981 which appointed such Guardians.

(2) The Temporary Guardian of the Person of Nora Eichorn and the Temporary Guardian of the Estate of Nora Eichorn did not authorize the services for which Plaintiff seeks compensation nor did they accept the benefits of such services on behalf of Nora Eichorn.

(3) On 25 June 1982 when Plaintiff first sought court approval for the compensation for which she now sues, the Temporary Guardians of the Person and Estate of Nora Eichorn disaffirmed any contract for legal services between Plaintiff and Nora Eichorn.

It is therefore,

ORDERED, ADJUDGED, and DECREED that PLAINTIFF TAKE NOTHING AGAINST Defendant and that all costs of this suit be charged against Plaintiff, for which let execution and other appropriate process issue if not duly paid.

SIGNED on this 29th day of August, 1984.

/s/ Jim Scanlan
Presiding Judge

APPROVED ****

BUTLER & BINION
****
ATTORNEYS FOR DEFENDANT,
ALLIED BANK OF TEXAS, HOUSTON, TEXAS

FINGER, SMALL, COHEN, FORLANO & SYNNOTT
****
ATTORNEYS FOR BEVERLY L. BREAUX,
PLAINTIFF

RSLA9/J

PROBATE COURT NO. 3
OF
HARRIS COUNTY, TEXAS

October 19, 1984

GUARDIANSHIP OF
NORA EICHORN, NCM

BEVERLY L. BREAUX, ATTORNEY
OF NORA EICHORN BOSWELL
V.
ALLIED BANK OF TEXAS,
SECOND TEMPORARY GUARDIAN OF
ESTATE OF NORA EICHORN

ORDER ON PLAINTIFF'S MOTION

On the 21st day of September 1984, came on to be heard Plaintiff Beverly L. Breaux's Motion to (1) Set Aside Order Granting Summary Judgment for Defendant (2) Compel Production by Court Reporter Patricia Harrington (3) Enter Order Granting Summary Judgment for Plaintiff; and it appearing to the Court that such Motion has been properly served upon Defendant, and that Defendant was properly notified of the hearing on such Motion; and after considering said Motion, the affidavits and other exhibits thereto, as well as

arguments of counsel, it is accordingly

ORDERED that the Motion to Compel Production of the Statement of Fact for November 24, 1981, by Court Reporter Patricia Harrington is GRANTED. It is further

ORDERED that the Motion to Set Aside Order Granting Summary Judgment for Defendant and Enter Order Granting Summary Judgment for Plaintiff is DENIED.

SIGNED this 19th day of October, 1984.

/s/ Jim Scanlan
Judge Presiding

(Certificate of Service Omitted)

CONSTITUTIONAL PROVISION AND STATUTES

That part of the Fourteenth Amendment to the United States Constitution which provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TEXAS PROBATE CODE:

§131 Procedure (for Temp. Administration)

(a) Necessity of Appointment. Whenever it appears to the county judge that the interest of a decedent's estate, or the interest of any minor, person of unsound mind, or common or habitual drunkard, and his or her estate, or either of them, requires immediate appointment of a personal representative, he shall, by written order, appoint a suitable temporary representative, with such limited powers as the circumstances of the case require, and such appointment may be made permanent, as herein provided. (emphasis added)

(b) Manner of Appointment. Such appointment may be made with or without written application and without notice or citation. The order shall designate the appointee appropriately, as "temporary administrator"

of the decedent's estate, or as "temporary guardian" of the person or of the estate, or both, of such minor, person of unsound mind, or common or habitual drunkard, fix the bond to be given and define the powers conferred on the appointee. When any such appointee has taken and filed his oath and filed with the county clerk a bond approved by the court, the clerk shall issue to the appointee letters which shall set forth the powers to be exercised by the appointee.(emphasis added)

(c) Perpetuation of Apointment. The order making the appointment shall state that, unless the same is contested after service of citation, it shall be continued in force for such period of time as the court shall deem in the interest of the estate or person involved, or it shall be made permanent, if found by the court to be necessary.

(d) Citation Relative to Perpetuation. Immediately after such appointment the clerk shall issue and cause to be posted a notice, and if necessary issue citations, to all interested persons to appear at the time stated in such writ and contest said appointment if they so desire; and such notice or citation shall state that, if no contest is made, the appointment will be continued for such time as appears to the interest of the estate or person involved, or that, if found necessary by the court, it shall be made permanent.

(e) Contest. If the appointment is contested, the court shall hear and determine the same, and during the pendency of such contest, the temporary appointee shall continue to act as such. If the appointment is set aside, the court shall

require the appointee to prepare and file, under oath, a complete exhibit of the condition of the estate which has come into his possession, and show what disposition he has made of the same or any portion thereof. (emphasis added)

[Acts 1955, 54th Leg., p.88, ch.55, eff. Jan. 1, 1956.]

§113A Appointment of Attorney Ad Litem

In a proceeding under the provisions of this chapter for the appointment of a guardian of a person who is not a minor, the judge may appoint an attorney ad litem to represent the interests of the person for whom the permanent guardianship is sought and shall allow the attorney ad litem a reasonable fee for his services to be taxed as part of the costs.(emphasis)

[Acts 1977, 65th Leg., p. 1380, ch. 551, eff. Aug. 29, 1977.]

§419 New Trial

The court may, for good cause shown, at any time within ten days after the verdict has been returned and judgment has been rendered, set aside the same and grant a new trial to either party; but, when two juries have concurred in a case, the second verdict shall not be set aside.

[Acts 1955, 54th Leg., p. 88, ch. 55, eff Jan 1, 1956.]

§109 Persons Qualified to Serve as Guardian

(a) ***
(b) ***

(c) Guardians for Persons Other Than Minors. If a person is an incompetent, or one for whom it is necessary that a guardian be appointed to receive funds due from any governmental source, these rules shall govern:

(1) If such person has a spouse who is not disqualified, such spouse shall be entitled to the guardianship in preference to any other person.

(2) If there be no qualified spouse, the nearest of kin to such person, who is not disqualified, or in case of refusal by such spouse or nearest of kin to serve, then any other qualified person shall be entitled to the guardianship.

(3) Where two or more persons are equally entitled, the guardianship shall be given to one or the other, according to the circumstances, only the best interest of the ward being considered.

(emphasis added)
[Acts 1955, 54th Leg., p.88, ch. 55, eff. Jan. 1, 1956. Amended by Acts 1965, 59th Leg., p.689, ch.328, §1; Acts 1979, 66th Leg., p.39, ch.24, §22, eff. Aug 27, 1979.]

Amendments and Additions, after the May 17, 1983 death of Nora Eichorn Boswell:

Effective Sept 1, 1983, Limited Guardianship was expanded from Mentally Retarded Persons to other Physically or Mentally Incapacitated Persons.

§130A Limited Guardianship

(a) Limited guardianship for incapacitated persons shall be utilized only as necessary to promote and protect the well-being of the individual, shall be designed to encourage the development of maximum self-reliance and independence in the individual, and shall be ordered only to the extent necessitated by the individual's actual mental or physical limitations. An incapacitated person for whom a limited guardian has been appointed shall not be presumed to be incompetent and shall retain all legal and civil rights and powers except those which have by court order been designated as legal disabilities by virtue of having been specifically granted to the limited guardian. An appointment of a limited guardian shall be made pursuant to the provisions of Part 5, Chapter V.(emphasis added)

(b) For the purposes of Chapter V. Texas Probate Code, "incapacitated person" means an adult individual who, because of a physical or mental condition, is substantially unable to feed, clothe, or shelter himself, to care for his own physical health, or to manage his property or financial affairs. A determination of incapacity must be evidenced by recurring acts or occurrences within the preceding six-month period and not by isolated instances

of negligence or bad judgment.(emphasis added)

§130B Authority to Appoint ****

§130C Petition; Contents
The person alleged to be incapacitated or a person interested in his welfare may petition the court for the appointment of a limited guardian. ****

§130D Filing Fee ****

§130E Notices and Citations ****

§130F Examination and Report ****

§130G Hearing
(a) The person alleged to be incapacitated shall be present at the hearing, unless the court determines that such personal appearance would not be in the person's best interest. He is entitled to be represented by counsel. If after examining the person's assets the court determines that he is unable to pay for counsel, the county is responsible for costs of counsel. He is entitled, on request, to a jury trial. At the hearing, the court shall:

(1) inquire into the ability of the allegedly incapacitated person to feed, clothe, ***** (emphasis added)

§130H Order of the Court ****

§130I Who May be Guardians

(a) Only a person, institution, or corporation found by the court to be suitable may be appointed limitd guardian. ****

(b) Prior to appointment, the court shall make reasonable effort to question the incapacitated person concerning his preference of the person to be appointed limited guardian, and a preference indicated shall be given due consideration by the court. (emphasis added)

§130 J thru O (omitted)

[Acts 1977, 65th Leg., p. 1171, ch.449,§1, eff. Aug.29, 1977. Amended by Acts 1983, 68th Leg., p.4110, ch.647, §1, eff. Sept. 1, 1983.]

Effective May 26, 1985, §131 was amended and a new §118A was added.

(Amended)
§131 Procedure (for Temp. Administration)

(a) Necessity of Appointment. Whenever it appears to the county judge that the interest of a decedent's estate, or the interest of any minor, incapacitated person as defined in Section 130A of this code, or common or habitual drunkard, and his or her estate, or either of them, requires immediate appointment of a personal representative, he shall, by written order, appoint a suitable temporary representative, with such limited powers as the circumstances of the case require, and such appointment may be made permanent, as herein provided. (emphasis added)

(b) A written application for the appointment of a temporary guardian may be filed prior to the court's appointment of such guardian but in no case shall such application be filed later than the end of the next business day of the court after appointment of such temporary guardian. The application shall state: (emphasis added)

(i) the name and address of the subject of the guardianship proceeding;

(ii) the danger alleged to be imminent;

(III) the type of appointment and the particular protection and assistance being requested;

(iv) the facts and reasons supporting the allegations and requests;

(v) the name, address, and qualification of the proposed temporary guardian;

(vi) the name, address, and interest of the applicant.

(c) At the earliest of the filing of an application for temporary guardianship or the appointment of such guardian, an attorney shall be appointed to represent the respondent in all guardianship proceedings in which independent counsel has not been retained by or on behalf of that individual. (emphasis added)

(d) Upon the filing of an application for temporary guardianship the clerk shall issue notice which shall be served upon the respondent, the guardian, and the respondent's appointed attorney. The notice must describe the rights of the parties, and the date, time, place, purpose and possible consequences of a hearing on the application. A copy of the application and, if applicable, a copy of the order appointing temporary guardian, must be attached to the notice. (emphasis added)

(e)(1) A hearing shall be held within 10 days of the filing of the application for temporary guardianship unless extended as set out in Subdivision 2 below at which the respondent has the following rights:

(i) prior notice;
(ii) representation by counsel;
(iii) be present;
(iv) present evidence and confrontation and cross-examine witnesses;
(v) right to a closed hearing if requested by respondent or his attorney. (emphasis added)

(2) Every temporary guardianship granted prior to a hearing on the application required by Subsection (e)(1) above shall expire by its terms at the conclusion of such hearing unless within this time the respondent or his attorney consents that such order may be extended for a longer period not to exceed 60 days from the date of the filing of the application for temporary guardianship. (emphasis added)

(3) Every temporary guardianship granted prior to a hearing on the application required by Subsection (e)(1) above shall be set down for hearing at the earliest possible date and takes precedence over all matters except older matters of the same character. (emphasis added)

(4) Every temporary guardianship granted prior to a hearing on the application required by Subsection (e)(1) above shall include an order setting a certain date for hearing on the application for temporary guardianship. (emphasis added)

(5) On one day's notice to the party

who obtained a temporary guardianship prior to a hearing on the application required by Subsection (e)(1) above, the respondent or his attorney may appear and move for its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require. (emphasis added)

(f) If at the conclusion of the hearing required by Subsection (e)(1) above the court determines that the applicant has established that there is imminent danger that the physical health or safety of the respondent will be seriously impaired and/or that respondent's estate will be seriously damaged or dissipated unless immediate action is taken, it shall apoint a temporary guardian by written order. The court shall assign to the temporary guardian only those duties and powers necessary to protect against the imminent danger shown. (emphasis added)

(g) At no time shall any temporary guardianship remain in effect for longer than 60 days. (emphasis added)

(h) If after the hearing required by Subsection (e)(1) above the court appoints a temporary guardian, then all costs of court including attorney's fees may be assessed as provided in Section 247 of this code.

[Amended by Acts 1985, 69th Leg., p.6727, ch.929, §1, eff. Aug. 26, 1985.]

(New)
§118A Designation of Guardian Before Need Arises

(a) A person, other than a minor or an incompetent, may designate by a written declaration persons to serve as guardian of the person of the declarant or the estate of the declarant in the event the declarant becomes incompetent. The declaration must be attested to by at least two credible witnesses 14 years of age or older who are not named as guardian or alternative guardian in the declaration. (emphasis added)

(b) A declarant may, in the declaration, disqualify named persons from serving as guardian of the declarant's person or estate, and the persons named may not be appointed guardian under any circumstances. (emphasis added)

(c) The declaration must have attached a self-proving affidavit signed by the declarant and the witnesses attesting to the competence of the declarant and the execution of the declaration. A properly executed and witnesses declaration and affidavit are prima facie evidence that the declarant was competent at the time he executed the declaration and that the guardian named in the declaration would serve the best interests of the ward. (emphasis added)

(d) The declaration and affidavit may be filed with the court at any time after the application for appointment of a guardian is filed and before a guardian is appointed. Unless the court finds that the person designated in the declaration to serve as guardian is disqualified or

would not serve the best interests of the ward, the court shall appoint the person as guardian in preference to those otherwise entitled to serve as guardian under this code. If the designated guardian fails to qualify, is dead, refuses to serve, resigns, or dies after being appointed guardian, or is otherwise unavailable to serve as guardian, the court shall appoint the next qualified designated alternate guardian named in the declaration. If the guardian and all alternate guardians fail to qualify, are dead, refuse to serve, or later die or resign, the court shall appoint another person to serve as otherwise provided by this code. (emphasis added)

(e) The declarant may revoke a declaration in any manner provided for the revocation of a will under Section 63 of this code, including by the subsequent reexecution of the declaration in the manner required for the original declaration.

(f) If a declarant designates the declarant's spouse to serve as guardian under this section, and the declarant is subsequently divorced from that spouse before a guardian is appointed, the provision of the declaration designating the spouse has no effect.

(g) A declaration and affidavit may be in any form adequate to clearly indicate the declarant's intention to designate a guardian. The following forms may, but need not, be used:

(Forms Omitted)

[Added by Acts 1985, 69th Leg., p.6731, ch. 929, §2, eff. Aug. 26, 1985.]

HOUSTON BAR ASSOCIATION
SECTION OF PROBATE, TRUST AND ESTATES
NEWSLETTER--SEPTEMBER 1, 1986

Dear HBA Member:

****

During the past several months, a committee from our Section has met with various staff members of the four Harris County Probate Courts. **** The staff members were asked to describe their job functions and then, on the basis of their experiences, to offer any suggestions or advice they felt would be useful to atorneys handling probate matters. ****

TEMPORARY GUARDIANSHIPS

The general feeling among staff members is that temporary guardianships were being abused and that the new limited guardianship procedures set forth in Sections 130(A)-130(O) of the TPC will eliminate some of the abuse. It was pointed out the temporary guardianships will now involve more time, more expense and more potential attorney liability than before. For this reason, it was felt that more people will now choose to go directly with a permanent guardianship. (emphasis added)

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Supreme Court, U.S.
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NO. 86,610

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BEVERLY L. BREAUX,
Appellant

v.

ALLIED BANK OF TEXAS,
TEMPORARY GUARDIAN OF THE
ESTATE OF NORA EICHORN, N.C.M.,
Appellee

ON APPEAL FROM
THE SUPREME COURT OF TEXAS

MOTION TO DISMISS OF APPELLEE

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MOTION TO DISMISS OF APPELLEE

To The Supreme Court Of The United States:

NOW COMES Allied Bank of Texas, Temporary Guardian of the Estate of Nora Eichorn, N.C.M. ("Ward"), Appellee ("Appellee"), and moves that the Court dismiss the entire claim of Beverly L. Breaux, Appellant ("Appellant") herein, and in support thereof would respectfully show the Court as follows:

This is a suit for payment of attorney's fees ancillary to a contested guardianship proceeding. Appellant alleges that she entered into a binding contract for legal services with the Ward during the pendency of the related temporary guardianship and that the alleged contract with the Ward was binding on the guardianship estate.

Appellant raises three constitutional challenges: (1) the validity of Texas Probate Code ("TPC") § 131(b) in providing for the institution of a temporary guardianship without prior notice, on due process grounds; (2) the validity of TPC § 419 in allowing a new trial for a person for whom a jury verdict of competent has been returned, on equal protection grounds; and (3) the court practice of appointing the same person as temporary guardian and attorney ad litem on behalf of the Ward, on the due process ground that a conflict in such roles results in denial of effective assistance of counsel.

I. Constitutional Issues Not Timely and Properly Raised.

A federal question "which was not timely or properly raised and was not expressly passed on" will be dismissed. SUP. CT. R. 16.1(b). Stated another way, the federal question must either be (i) considered and passed on by the highest court of the state, *Whitfield v. Ohio,* 297 U.S. 431 (1936), or (ii) timely and properly raised in the state courts.

Where the highest court of the state declines or omits to consider the federal question, as in this case, the Supreme Court of the United States will refuse to review a federal question not properly raised in the trial court. *Pennsylvania R. Co. v. Illinois Brick Co.,* 297 U.S. 447 (1936), *Jennings v. Illinois,* 342 U.S. 104 (1951).

In this connection, the authority cited by Appellant (J.S. - p. 5) to support review by this Court stands for the proposition that review is appropriate regardless of when the question was raised if the highest state court, expressly or by necessary implication, passed on the federal question. The complete quote from Appellant's authority states as follows: "[I]t is not necessary that the ruling shall have been put in direct terms. If the necessary effect of the judgment has been to deny the claim, that is enough." *New York ex rel. Bryant v. Zimmerman,* 278 U.S. 63 (1928).

However, absent an express or implied decision by the highest state court, the federal question must be raised "in due time." *Id.* at p. 67. In addition to the requirement that the federal question be timely raised at the trial court level, a presumption exists regarding the omission of the highest state court to decide the federal question. Where the highest state court fails to pass on the federal question, it is presumed that the omission is due to want of proper presentation in the state courts, unless the aggrieved party can affirmatively show the contrary in the Supreme Court of the United States. *Webb v. Webb,* 451 U.S. 493 (1981), *citing Street v. New York,* 394 U.S. 576 (1969).

As reflected in Appellant's Jurisdictional Statement, the constitutional challenge to TPC § 131(b) was not made until Motion for Rehearing in the 14th Court of Appeals of Texas (J.S. - p. 12). Appellant's remaining two constitutional challenges, relating to TPC § 419 and the purported conflict of appointed counsel, were not asserted in this cause until Appellant's post-trial Motion to Set Aside Order Granting Summary Judgment for Defendant (J.S. - p. 9). The assertion of the latter two

challenges in the post-trial motion was not timely raised because it could have been raised in Appellant's Response to the Motion for Summary Judgment. *Chambers v. Mississippi*, 410 U.S. 284 (1973).

With respect to the timeliness of the claim of invalidity of TPC § 131(b), Appellant alleges the intermediate appellate court's opinion was "a surprise, which could not have been reasonably anticipated from prior decisions." (J.S. - p. 10). The prior decisions to which Appellant's Jurisdictional Statement makes reference held that a temporary guardianship was not a final adjudication of incompetency. (J.S. - pp. 11-12). The opinion of the 14th Court of Appeals of Texas in this case adheres to this rule of law from these prior decisions: "We agree that there has been no final adjudication of incompetence." (J.S. - p. A14).

The decision of the 14th Court of Appeals of Texas stands for the simple proposition that an attorney who institutes a temporary guardianship for a ward cannot enter into a binding contract for legal services without court approval. Appellant's services were rendered during the pendency of the guardianship proceeding while both a guardian of the person and a guardian of the estate were acting under court authority on behalf of the Ward.

This holding was of no surprise under Texas law. The Order appointing Appellee makes it clear that Appellee was charged with the responsibility, as Guardian of the Estate, to take possession of, preserve and protect all of the Ward's property. Appellee became fully accountable for all of the Ward's property under Section 134 of the Texas Probate Code. It is not possible for this responsibility to coexist between the Ward and the Guardian.

In this connection, Appellant's Jurisdictional Statement provides, "Of further surprise, was the opinion at

page 7 (App. A23): 'Appellant has failed to show any of the alleged legal services rendered were necessaries.' " (J.S. - p. 12). In view of established Texas law, the holding of the intermediate appellate court should not have been a surprise. *Bowman v. Bowman,* 96 S.W.2d 667 (Tex. Civ. App.—Eastland 1936, no writ), held that where a guardian provides a ward with necessaries, the ward cannot bind himself to a stranger for the same. In *Dallas Trust and Savings Bank v. Pitchford,* 208 S.W. 724 (Tex. Civ. App.—Dallas 1919, no writ), the law is stated very clearly:

> It is the duty of a guardian to furnish his wards, whether infant or non compos mentis, with necessaries, and if a guardian fails or refuses to maintain a ward out of his estate, etc., he should be compelled to by the remedies provided, and a third person is not justified in discharging the guardian's duty. *Id.* at p. 726.

The *Pitchford* court also stated, "[W]e can see no good reason why a third party, who voluntarily incurs such expenses with knowledge of the pendency of the guardianship, should be allowed to recover." *Id.* at p. 726. Thus, there is no foundation to Appellant's claim of surprise with respect to the opinion of the 14th Court of Appeals of Texas. None of Appellant's three constitutional challenges was timely raised.

Each federal question must also be "properly" raised in the cause of action. SUP. CT. R. 16.1(b). Appellant's three constitutional challenges have not been properly raised because one cannot invoke the appellate jurisdiction of the United States Supreme Court to vindicate a right of a third party. *Liberty Warehouse Co. v. Burley*

Tobacco Growers' Co-op Marketing Assn., 276 U.S. 71 (1927). These challenges are to the validity of statutes and practices regulating the rights of the Ward. These challenges are totally independent of the right of Appellant to be paid for her volunteered legal services to the Ward.

Even if Appellant could assert such challenges on behalf of the Ward, which is hereby denied, such constitutional attacks must be by direct suit for that purpose rather than by collateral attack. *Walker v. City of Birmingham*, 388 U.S. 307 (1967), *State v. Gardner*, 54 Ohio St. 24, 42 N.E. 999 (1896).

II. The Constitutional Challenges Do Not Constitute Substantial Federal Questions.

It is well-settled that this Court will not assume jurisdiction of issues that are merely academic or episodic, particularly when the issues are constitutional in nature. Settlement of the controversy must be important to the public as distinguished from the parties. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955).

Appellant alleges the three constitutional challenges are substantial federal questions likely to evade this Court's review, "because elderly wards will usually: 1) die before their federal constitutional claims can be brought to this Court, and 2) be represented by court-appointed attorneys who, failing to serve as true advocates, are unlikely to pursue such appeals." (J.S. - pp. 2-3). The Texas guardianship statutes and practices in controversy apply to all wards, of whatever ages, and the fact that some wards may die before their claims could be brought to this Court does not indicate a substantial

federal question. Secondly, there is no presumption that court-appointed attorneys fail to serve as true advocates to pursue such appeals. As pointed out in Appellant's Jurisdictional Statement, the obligations of an attorney appointed by the Court are no different from those of a privately retained lawyer. *State ex rel. Memel v. Mundy,* 75 Wis. 2d 276, 249 N.W.2d 573, 577 (1977).

Turning to each of the three constitutional challenges separately, review is first made of the significance of the federal question related to the alleged invalidity of TPC § 131(b), for lack of due process of law (J.S. - p. 12). As reflected in the Appendix to Appellant's Jurisdictional Statement (J.S. - pp. A38-39), TPC § 131 as applicable during the Ward's guardianship, provided for temporary guardianships of persons of unsound mind, without prior notice. However, two aspects of the Texas temporary guardianship procedure make it immune to Appellant's constitutional attacks: (1) it was based on an immediate need resulting from the Ward's mental and physical regression, and (2) the Probate Court only granted Appellee the limited powers specified in the Order of Appointment. The powers of temporary appointees are tailored by the probate court to fit the needs of each case. *Ex parte Lindley,* 163 Tex. 301, 354 S.W.2d 364 (1962).

This Court has determined that due process requirements for civil commitments are less stringent than criminal proceedings because less deprivation of liberty and stigma are involved. *Addington v. Texas,* 441 U.S. 418 (1979). Certainly this is true to a greater extent when comparing temporary guardianships to permanent guardianships or court-ordered civil commitments.

Appellant alleges:

> The 1985 revision of § 131 (which added due process protections and now recognizes the right and power of a temporary ward to "retain" "independent counsel"), is the *strongest evidence* that the prior § 131 was constitutionally defective. . . . (J.S. - pp. 48-49; emphasis in original).

Appellant neglects to mention that the entire focus of TPC § 131 has changed from a protection of persons of unsound mind to a protection for incapacitated persons, whether physically or mentally incapacitated (J.S. - p. A44). The former statute has been virtually replaced by a statute for the benefit of an entirely different class of persons. A question that was once a substantial federal question may become insignificant and no longer deserve review by the Supreme Court due to an intervening repeal of the statute in question. *Morris v. Weinberger,* 410 U.S. 422 (1973). Even if the prior TPC § 131 raised a substantial federal question, which is hereby denied, the amendment of that statute has eliminated the necessity for review by this Court.

Finally with respect to TPC § 131(b), it is a well-settled rule that one who voluntarily proceeds under a statute and claims its benefits will not be heard to question its constitutionality in order to avoid its burdens. *Fahey v. Mallonee,* 332 U.S. 245 (1947). In this case Appellant sought the benefits of TPC § 131(b) by instituting the original temporary guardianship for the Ward under that statute. She cannot now be heard to complain of the constitutionality of that statute.

Appellant's second constitutional challenge relates to TPC § 419, under which a new trial can be granted re-

garding the final adjudication of a ward's incompetence. Appellant alleges that this statute is unconstitutional, "as a violation of the 'equal protection' clause of the 14th Amendment, because Texas law does not permit a new trial after a jury verdict favorable to an accused criminal nor to a proposed mental patient." (J.S. - p. 10).

This Court has pointed out that laws need not affect every man, woman and child exactly alike in order to avoid the constitutional prohibition against inequality. *Stebbins v. Riley,* 268 U.S. 137 (1925). The Equal Protection Clause does not forbid discrimination with respect to things that are different. *Rinaldi v. Yeager,* 384 U.S. 305 (1966). Furthermore, proposed incompetents do not constitute a suspect classification deserving strict scrutiny in evaluating the application of the Equal Protection Clause. The strict scrutiny test requiring a compelling state interest to allow a law to stand, referred to in Appellant's Jurisdictional Statement (J.S. - p. 49), is inapplicable.

Even if TPC § 419 were determined void as applied to proposed incompetents, the effect of a new trial could be achieved by the filing of a new application for permanent guardianship following a jury verdict finding the proposed ward competent. Therefore, striking down TPC § 419 would not eliminate the possibility of obtaining successive new trials regarding competency. The question of whether TPC § 419 is violative of the Equal Protection Clause is not a substantial federal question.

Appellant's third constitutional challenge relates to an alleged violation of a due process right to an attorney of the Ward's choice, "who would serve as her true advocate" (J.S. - p. 9). The Texas Probate Code procedure

under which the attorney ad litem for the Ward in this case was appointed is discretionary with the court, as pointed out in Appellant's Jurisdictional Statement (J.S. - p. A40). Under the statute, TPC § 113(a), the attorney ad litem is to "represent the interests of the person for whom the permanent guardianship is sought." If the duty of the attorney ad litem is to safeguard the ward's best interests, it does not necessarily follow that the attorney ad litem's duty is always to advocate the competency of the proposed ward. If a proposed ward should be protected by a guardianship, it is clearly not in his best interests for his attorney ad litem to advocate his competency.

Under the Texas Code of Professional Responsibility, a lawyer should represent a client zealously within the bounds of the law. Canon 7. The Ethical Considerations to Canon 7 also state as follows:

> Any mental or physical condition of a client that renders him incapable of making a considered judgment on his own behalf casts additional responsibilities upon his lawyer. Where an incompetent is acting through a guardian or other legal representative, a lawyer must look to such representative for those decisions which are normally the prerogative of the client to make. If a client under disability has no legal representative, his lawyer may be compelled in court proceedings to make decisions on behalf of the client. State Bar of Texas, Ethical Considerations on Code of Professional Responsibility EC 7-12 (1972).

The quoted ethical consideration may require that an attorney ad litem make a decision on behalf of the client

to advocate incompetnecy in a given situation. Such a position does not indicate a result from a conflict with such attorney's contemporaneous role as temporary guardian of the ward's person, such that the ward has lost effective assistance of counsel.

In any event, even if the temporary guardianship in this case had evolved into the unconstitutional deprivations of the Ward's rights, as alleged by Appellant and hereby denied, Appellant should have taken steps to dissolve the temporary guardianship. Instead, Appellant chose to continue to assert that she represented the Ward, but never sought probate court authority to do so. She chose to rely on the theory that she was furnishing legal services at the Ward's request. In this case she seeks payment for those legal services.

Finally with respect to the challenge relating to the Ward's right to counsel, there is no substantial federal question since the Ward was not denied the counsel of Appellant. (J.S. - p. 25). Appellant was allowed to participate in the guardianship proceedings, resulting in no deprivation of the constitutional right claimed. By contrast, in this case, the claim of Appellant is to payment for volunteered legal services during the pendency of a temporary guardianship, rather than denial of right to counsel of the Ward.

III. Adequate State Ground Exists.

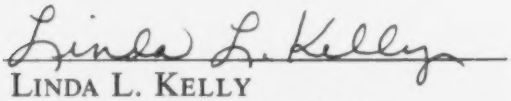
It is well-settled that this Court will not review a decision of a state court which rests upon adequate non-federal grounds. Where the highest state court delivers no opinion, as in this case, and it appears that the judgment might have rested upon a non-federal ground, the

Supreme Court will not accept jurisdiction. *Durley v. Mayo,* 351 U.S. 252 (1956). The adequate state ground upon which the judgment rests in this case is the Texas law that an attorney who institutes a temporary guardianship for a ward cannot, during the pendency of that guardianship, enter into a binding contract with the ward for legal services without court approval.

WHEREFORE, PREMISES CONSIDERED, Allied Bank of Texas, Temporary Guardian of the Estate of Nora Eichorn, N.C.M., respectfully requests that this Court dismiss Appellant's Appeal in its entirety for lack of jurisdiction; that all costs of this proceeding be taxed against Appellant; and that Appellee be granted such other and further relief as the Court deems proper.

Respectfully submitted,

DINKINS & KELLY

By: 

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Appellee's Motion to Dismiss was transmitted to Ms. Beverly L. Breaux, Appellant, by certified mail, return receipt requested, on the 10th day of November, 1986.

Linda L. Kelly

LINDA L. KELLY